Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

GRUPO PROTEXA, S.A., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO, AND CONDUX, S.A. DE C.V., A COMPANY ORGANIZED UNDER THE LAWS OF THE REPUBLIC OF MEXICO,

Petitioners,

vs.

ALL AMERICAN MARINE SLIP, A DIVISION OF MARINE OFFICE OF AMERICA CORPORATION, A NEW YORK CORPORATION, AFIA, A DELAWARE CORPORATION, AND CIGNA, A DELAWARE CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, All American Marine Slip and CIGNA ("Respondents"), respectfully submit that Petitioners' framing of the questions presented is somewhat misleading, in that they suggest that Respondents are seeking to litigate issues already decided in Mexican proceedings or that Respondents could have litigated in Mexico. Petitioners' first question is phrased in terms of whether "a U. S. District Court . . . [can] review *de novo* a determination by a foreign government of its authority under its law to issue a coercive removal order. . . . " The use of the term *"de novo"* would seem to imply that the American court was "[t]rying a matter anew . . . as if it had not been heard before and as if no decision had been previously rendered." Black's Law Dictionary 392 (5th ed. 1979). To the extent that Petitioners seek to imply that the Mexican courts or other competent Mexican authorities reviewed the validity of the order, their suggestion has no basis in the record.

In a similar vein, Petitioners' second question suggests that Respondents "were in a position to cause its [the wreck removal order's] validity to be litigated at the time of its occurrence." As will be explained in more detail, Petitioners' statement of the issues ignores the fact that Respondents were *re*insurers, not direct insurers, and had no authority to interfere with Petitioners' handling of the wreck removal, and certainly did not have authority to ask Petitioners to desist from taking actions which the district court found were undertaken for commercial reasons.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Third Circuit are listed in the caption.

CORPORATE PARTY'S AFFILIATION

Marine Office of America Corporation is a wholly owned subsidiary of the Continental Corporation.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Corporate Party's Affiliation ii

Table of Contents iii

Table of Citations iv

Statement of the Case 1

A. The Policy 1

B. The Wreck 3

C. Removal Ordered By Mexican Government 4

D. Underwriters' Notice and Agreement 4

E. Final Adjustment – "Invalidity" Claim 5

Reasons the Writ Should be Denied 6

I. Act of State 7

II. Compulsory by Law 11

Conclusion 12

TABLE OF CITATIONS

Page

CASES CITED:

Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976) 7

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 7, 8, 9

Bell v. Burson, 402 U.S. 535 (1971) 11

East Coast Tender Serv., Inc. v. Robert T. Winzinger, Inc., 759 F.2d 280 (3d Cir. 1985) 11

Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1988) 7

Heiner v. Donnan, 285 U.S. 312 (1932) 11

Kalmich v. Bruno, 553 F.2d 549 (7th Cir. 1977) 5

Oetjen v. Central Leather Co., 246 U.S. 297 (1918) 7, 8

Ricaud v. American Metal Co., 246 U.S. 304 (1918) 7

Tot v. United States, 319 U.S. 463 (1943) 11

Underhill v. Hernandez, 168 U.S. 250 (1897) 7

Vlandis v. Kline, 412 U.S. 441 (1973) 11

W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990) 7, 8, 9

COURT RULES:

Fed. R. Civ. P. 44.1 5

UNITED STATES CONSTITUTION CITED:

Fifth Amendment 11

TABLE OF CITATIONS – Continued

Page

OTHER AUTHORITIES CITED:

Black's Law Dictionary 392 (5th ed. 1979) i

James Herget & Jorge Camil, *An Introduction to the Mexican Legal System* 27 (1978) 6

Robert Leflar, *American Conflicts Law* §§ 1, 4 (1986) 8

United Nations Convention on the Law of the Sea 3

APPENDIX

Appendix A – Transcript of Proceedings, February 27, 1989, granting Respondents' Motion to Dismiss on Estoppel Issues 1a

STATEMENT OF THE CASE

Certain statements in Petitioners' Statement of the Case are misleading, either because facts are affirmatively misstated, or by way of omission. Respondents will not attempt to restate all the relevant facts, but only to address the inaccuracies in Petitioners' Statement of the Case.

A. The Policy.

Contrary to the Petition, Respondents did not issue an insurance policy to Petitioners, but rather reinsured certain Mexican insurance companies which had in turn insured Petitioners.[1] While this distinction may be subtle, it emasculates Petitioners' argument that Respondents "had the contractual power and opportunity to insist that Petitioners question the validity of the order in Mexican courts." Petition at 18.

The policy does contain a "claims control" clause, which provides as follows:

> Reinsurers [Respondents] hereon shall have control of all claims negotiations and/or decisions and/or settlements hereunder, and their

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[1] The policy defines the "Reassured" as Seguros Monterrey, S.A., Seguros La Commercial, S.A., Aseguradora Del Pais, and Seguros Mutua, S.A. Petitioners are defined as the "Original Assured." Appendix to Brief of Plaintiffs/Appellants Grupo Protexa, S.A. et al; In the United States Court of Appeals for the Third Circuit; No. 93-5332 at A-445 (hereinafter cited as "Third Circuit Appendix").

> decisions shall be final and are binding *upon the Reassured* [Seguros Monterrey, et al].

Third Circuit Appendix at A-450 (emphasis added).

While the claims control clause may have given Respondents the right to insist that the Mexican insurers insuring Petitioners pay or deny the claim submitted to them by Petitioners, nothing in the clause gave Respondents the right to direct *Petitioners* in their handling of the removal operation; Respondents were not in privity of contract[2] with Petitioners and could not legally have insisted that Petitioners contest the wreck removal order in a Mexican court. Moreover, Petitioners admit in their petition that "there were intense social and political pressures for the removal," Petition at 4, and the district court found after the first trial that Petitioners "responded out of moral and commercial necessity," not because of legal compulsion. Appendix E to Petition at 188a. Respondents could scarcely have insisted that Petitioners ignore Petitioners' own legitimate (albeit uninsured) interest in removing the wreck to appease the Mexican state oil company that was Petitioners' only marine construction client, the families of the deceased crewmen, and Mexico's most powerful union to which the deceased crewmen had belonged. Appendix E to Petition at 125a. Accordingly, Petitioners' suggestion that Respondents

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[2] Presumably, Respondents could have raised this issue as a complete defense to Petitioners, and required Petitioners to sue their Mexican insurers. Respondents had no desire to protract this litigation, however, and did not (and do not) interpose lack of privity as a defense.

had the right and the duty to insist that Petitioners contest the validity of the order in the Mexican courts has no basis in the record.

B. The Wreck.

The Huichol II sank 45 miles offshore, well outside of Mexican territorial waters. The wreck lay more than 500 meters from any structure. Trial II, Appendix C to Petition at 84a and 117a. While the Huichol II indeed sank in an area which is marked on nautical charts with the notation "anchorage prohibited," and while some witnesses described this as an "area of extreme safety," these terms have no legal significance under Mexican law. The notation "anchorage prohibited" is inserted on charts by the United States Defense Mapping Agency, but the Mexican government has never designated the area in question as an area where anchoring is prohibited or as an "area of extreme safety" through any statute, regulation, or other official promulgations. Trial II, Appendix C to Petition at 115a; Appeal II, Appendix B to Petition at 33a n.17.

Furthermore, it is highly questionable whether the Mexican government could have designated the area in question as a safety zone without violating international law. Under the United Nations Convention on the Law of the Sea, "[t]he coastal State may, where necessary, establish reasonable safety zones around . . . artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures." Art. 60, ¶ 4, Appendix B to Petition at 64a. However, the

breadth of the safety zones must be declared by the coastal State, "and shall not exceed a distance of 500 metres around them." Art. 60, ¶ 5 (not quoted in Petition); Exhibit 5 to Brief of Defendants/Appellees All American Marine Slip; In the United States Court of Appeals for the Third Circuit; No. 93-5332.

Finally, while the Mexican wreck removal statutes in question are geographically oriented, permitting the government to order the removal of wrecks which sink in "general ways of communication by water", ports, and the vicinity or proximity of a port, there are no Mexican statutes or regulations authorizing wreck removal orders because a ship is located in an "anchorage prohibited zone" or an "area of extreme safety." Any suggestion that the terms "anchorage prohibited zone" or "area of extreme safety" have any legal significance is without any basis in the record.

C. Removal Ordered By Mexican Government.

As noted above, the district court found after Trial I that Petitioners removed the wreck not because of legal compulsion, but because of the intense economic, social and political pressures they faced as a result of the sinking. Petitioners' witnesses admitted at Trial I that this did not constitute legal compulsion required by the policy. Trial I, Appendix E to Petition at 188a.

D. Underwriters' Notice and Agreement.

As noted above, Petitioners' suggestion that Respondents "had a contractual right under the terms of the

Policy at that time to ask Petitioners to make further inquiry into its validity or make a challenge to it in the Mexican courts" ignores the fact that Respondents were *re*insurers of several Mexican insurers, and not direct insurers of Petitioners. It also is an attempt to revive an argument that Respondents should somehow be estopped from contesting the validity of the order, an argument which was directly rejected by the district court on a motion for summary judgment and never appealed. Appendix A to Brief in Opposition.

E. Final Adjustment – "Invalidity" Claim.

In this portion of their petition, Petitioners quote extensively from an "opinion" supposedly issued by the office of the Marine Mercante after being requested "following established administrative procedures." The document was originally obtained by Petitioners in an attempt to convince Respondents to pay the claim, and was attached as an exhibit to Petitioners' motion for summary judgment without authentication.[3] While this document arguably could be considered as some proof of Mexican law under Rule 44.1 of the Federal Rules of Civil Procedure, *see Kalmich v. Bruno*, 553 F.2d 549, 555 n.4 (7th Cir. 1977), there is nothing in the record to suggest that it

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[3] When Petitioners attempted to introduce this document at Trial I, the district court sustained Respondents' hearsay and relevance objections. This ruling was never appealed, and Petitioners made no attempt to introduce the document at Trial II. When Petitioners cited it in the reply brief in Appeal II, Respondents moved to strike the document. The Third Circuit overruled this motion. Appendix B to Petition at 33a n.17.

was obtained pursuant to "established administrative procedures," or that non-lawyer Mexican administrative officials are empowered to opine on the authority of their own departments. On the other hand, Mexico does have a specific judicial procedure, the *amparo*, for testing the extent of administrative authority. Appeal II, Appendix B to Petition at 34a n.19; *see also* James Herget & Jorge Camil, *An Introduction to the Mexican Legal System* 27 (1978). This procedure is frequently used to test the validity of wreck removal orders, Appendix B to Petition at 34a n.19, but was not utilized by Petitioners. Accordingly, the so-called "opinion" scarcely constitutes an "unequivocal affirmation of the Port Captain's authority from the highest levels of the Mexican government . . . . "

REASONS THE WRIT SHOULD BE DENIED

The Third Circuit opinion does not conflict with opinions of this Court or of other courts of appeal. The act of state doctrine as currently applied by this Court requires lower courts to balance the parties' right to their day in court with the Executive Branch's need for flexibility in dealing with foreign states. The Third Circuit conducted the balancing test required by this Court's decisions, and correctly held that the doctrine was inapplicable because the case did not present implications for the Executive Branch's conduct of foreign relations.

The Third Circuit's ruling that an invalid wreck removal order, in and of itself, does not create legal compulsion is consistent with the rulings of all the courts of appeal which have ruled on this issue.

I. ACT OF STATE

The Third Circuit opinion is completely consistent with 30 years of jurisprudence of this Court. In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), this Court rejected "an inflexible and all-encompassing" rule to determine when the doctrine applies. *Id.* at 428. In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990), this Court expressly stated that "even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application," and that a balancing approach should be applied "in order to avoid unquestioning judicial acceptance of the acts of foreign sovereigns." *Id.* at 409. As the Third Circuit stated in the *Environmental Tectonics* case, "[f]or this reason, the Supreme Court has not laid down rigid rules to govern the doctrine's application, but leaves it to the lower courts to determine whether a conflict between the judicial and political branches exists in a particular case." *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1058 (3d Cir. 1988).

A majority of the members of this Court have described the act of state doctrine as a choice-of-law rule. *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 705 n.18 (plurality op. per White, J.), 726-78 (Marshall, J., dissenting) (1976). While some of this Court's early act of state cases do use language that might support Petitioners' argument, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918), these cases were decided in the heyday of Professor Beale's "vested rights" theory of conflicts of laws.

See Robert Leflar, *American Conflicts Law* §§ 1, 4 (1986). Accordingly, it is perhaps not surprising that these cases use language consistent with a rigid formulaic approach. Modern, sophisticated choice of law theory is much more flexible, however, and this Court's approach to the act of state doctrine has similarly evolved:

> This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon the "highest considerations of international comity and expedience," *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

Environmental Tectonics, 493 U.S. at 404. Accordingly, this Court has developed the sensitive balancing test to determine the applicability of the doctrine. The Third Circuit utilized this approach, and found that this case does not implicate the separation of powers concerns underlying the doctrine since adjudication did not pose a potential interference with the Executive Branch's foreign policy prerogative. Petitioners do not even argue that the Third Circuit erred in concluding that there was no potential impact on American diplomacy. This Court need not grant certiorari simply to reaffirm its recent decisions setting forth how the lower courts should determine the applicability of the act of state doctrine.

Nor do Petitioners point to a single case from another court of appeals decided since *Sabbatino* where the court utilized the mechanical formula Petitioners advocate. In the absence of some conflict with another circuit's opinion or an opinion of this Court, there is no need to grant certiorari.

Petitioners' second argument, that separation of powers and sensitive foreign policy considerations are only a consideration when the act of state is arguably offensive to United States or international law, is contrary to this Court's jurisprudence and would create a bizarre anomaly. In *Sabbatino,* this Court expressly stated that "the less important the implications of an issue for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428. Petitioners would stand this reasoning on its head, and apply the act of state doctrine mechanically to deprive parties of their day in court in those cases where American public policy or international law issues are not present and the application of the doctrine serves no valid interest.

The tenor of the opinions from this Court dealing with the act of state doctrine leaves little doubt that depriving parties of the right to full adjudication via the act of state doctrine is at best a necessary evil. *See Banco Nacional de Cuba v. Sabbatino,* 376 U.S. at 427 ("If the act of state doctrine is a principle of decision . . . compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."); *W.S. Kirkpatrick v. Environmental*

Tectonics, 493 U.S. at 409 ("The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.") Petitioners would have this Court extend the act of state doctrine to prevent American courts from deciding cases on the merits even where the purpose of the doctrine is not served. There is no need for this Court to grant certiorari to create such an anomalous quirk in the act of state doctrine.

Petitioners' final argument on the act of state doctrine is essentially that by determining whether removal was in fact compulsory by law rather than applying the act of state doctrine to create an irrebuttable presumption of validity, the courts below somehow "abrogated Petitioners' vested contract rights in violation of the Due Process Clause." This theory requires little comment. While the insurance professionals that negotiated the manuscript policy[4] for Petitioners and Respondents were undoubtedly aware of the marine insurance cases construing the term "compulsory by law," Appeal I, Appendix D to Petition at 130a, it is extraordinarily unlikely that non-lawyers would be familiar with a legal concept as esoteric as the act of state doctrine. Accordingly, to suggest that the parties contracted with reference to the possibility that there would be cases where legal compulsion would be presumed and Petitioners would have only to institute suit in the United States to establish a critical element of coverage under the policy strains credulity.

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[4] The policy is composed of manuscript clauses drafted by Petitioners' representative, EII, on EII stationery, and certain form clauses. Third Circuit Appendix at A-445 *et seq.*

Accordingly, there are no constitutional implications in the lower courts requiring Petitioners to prove legal compulsion.

On the other hand, there would be considerable constitutional implications raised by application of an irrebuttable presumption of validity via the act of state doctrine; to deny Respondents the opportunity to defend themselves by showing that removal was not "compulsory by law" within the meaning of their contract would scarcely comport with the requirements of the Fifth Amendment. *See Vlandis v. Kline*, 412 U.S. 441 (1973); *Bell v. Burson*, 402 U.S. 535 (1971); *Tot v. United States*, 319 U.S. 463 (1943); *Heiner v. Donnan*, 285 U.S. 312 (1932). In view of the absence of any issues meriting a grant of Petitioners' petition for certiorari, however, this Court need not face the constitutional implications of the act of state doctrine at this time.

II. COMPULSORY BY LAW

No court that has ever considered the meaning of the term "compulsory by law" typically used in marine protection and indemnity policies as a precondition to liability for wreck removal has even suggested that an invalid governmental order, in and of itself, could constitute legal compulsion. In fact, of all the cases involving this issue, in only one other case, *East Coast Tender Service, Inc. v. Robert T. Winzinger, Inc.*, 759 F.2d 280 (3d Cir. 1985), had a wreck removal order even been issued. The court there did not even consider the validity of the order or whether that would have an effect on whether removal was "compulsory by law." Moreover, that case was from

the same circuit as this case, and thus presents no possibility of an intercircuit conflict. In the absence of some conflict of authority between the circuits, this Court's scarce resources should not be consumed on an arcane question of marine insurance law.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

GRUPO PROTEXA, S.A., a company organized under the laws of the Republic of Mexico, and CONDUX, S.A. de C.V., a company organized under the law of the Republic of Mexico,	:	Civil Action No. 86-4212
Plaintiffs,	:	TRANSCRIPT OF PROCEEDINGS
v.	:	
ALL AMERICAN MARINE SLIP, a New York business organization, and AFIA, a Delaware corporation,	:	
Defendants.	:	

Newark, New Jersey
February 27, 1989

BEFORE:

THE HON. ALFRED M. WOLIN, U.S.D.J.

APPEARANCES:

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Attorneys for Defendants.

Reported by:
CHARLES P. McGUIRE, C.S.R.
Official Court Reporter

* * *

[p. 36] MR. WATSON: Your Honor, in a sense, we're going to have to address the issue of New Jersey law on the estoppel issues, because they switch gears and they say Texas law on the bad faith issues and New Jersey law on the estoppel issues.

THE COURT: I've been through this, reading it. I understand. I'm prepared to decide the estoppel and the tortious interference as well today.

MR. WATSON: Let me, if I may, address the estoppel issues, and again, this will bear on the bad faith questions that have been raised here.

* * *

[p. 41] THE COURT: Thank you.

I'm satisfied that in terms of the choice of law I'm going to apply on the estoppel question, it's going to be Federal maritime law, and I'm satisfied that I will side with the Defendants on this issue, that there will be no estoppel applied to the reinsurance contract, that the contract is what it says it is, cannot be expanded, and therefore, I'll grant the application.

* * *